Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: March 19, 1998
CASE NO: 97-INA-175

In the Matter of:

OCEAN GROUP, INC.
Employer

On Behalf of:

REFIK PEKSEN
Alien

Before: Holmes, Jarvis, and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27 (c).

Statement of the Case

On August 15, 1994, Ocean Group, Inc. ("employer") filed an application for labor certification to enable Adnan Kocan ("alien") to fill the position of Electrician at an hourly wage of $29.35. The job duties are described as follows:

> Will plan layout; install and repair wiring, electrical fixtures, apparatus and control equipment. Will measure, cut, bend, thread, assemble and install electrical conduit, using such tools as hacksaw, pipe threader and conduit bender. Will connect wiring to lighting fixtures and power equipment, using handtools. Will prepare skeches [sic] showing location of wiring and equipment or follows diagrams or blueprints, insuring that concealed wiring is installed before completion of future walls, ceilings and flooring. Connect wiring to lighting fixtures and power equipments. Connect power cables to equipment. Tests continuity of circuit to insure electrical compatibility (AF 96).

The job requirements are a high school diploma with two years of experience in the job offered.

On May 21, 1996, the CO issued a Notice of Findings proposing to deny the labor certification. The CO cited §656.24 (b)(2)(ii) which states that the CO shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform the duties involved in the occupation. The CO cited a violation of §656.21(b)(6) which provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons. The CO determined that the employer failed to provide lawful, job-related reasons for rejecting Applicants Iosif Meyster, Paul McCormick, Radcliff Davis, Leroy Gambrell, Frank Carozza, Shelton Rainey, and David Godek. The CO also disputed the employer's compliance with §656.21(b)(2) which requires the employer to document that the requirements for the job opportunity, unless adequately documented as arising out of business necessity, are those normally required for the performance of the job in the United States. In its recruitment reports, the employer reported that applicants were rejected for reasons such as inability to commute and lack of gas station experience. The CO concluded that these were unstated requirements and thus unduly restrictive. Finally, the CO questioned whether the employer offered permanent, full-time work as required by §656.3. The CO observed that although the employer operated a gas station, it offered the position of Electrician.

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

In rebuttal, dated June 25, 1996, the employer argued that all applicants were rejected for lawful, job-related reasons. The employer pointed out that Applicant Meyster withdrew his application and that the remaining candidates either declined to appear at the scheduled interview or had already secured employment elsewhere. The employer also insisted that the job opening was for an electrician with two years of experience in any industry, but acknowledged that it would prefer an electrician who worked in the gas station industry (AF 85). Finally, the employer asserted that the job is full-time, permanent work because an electrician is required to service the eighteen gas stations it operates on Long Island.

The CO issued the Final Determination on July 1, 1996, denying certification. The CO found that the employer provided lawful, job-related reasons for rejecting Applicant Iosif Meyster, but continued to dispute the rejections of the remaining applicants. The CO reiterated her findings relating to the unduly restrictive requirements, noting that the preference that applicants possess electrician experience in the gas station industry was the equivalent of a job requirement. The CO also found that the employer failed to show that the position was full-time, permanent employment. She noted that the employer previously provided a list of the eighteen gas stations, but that there was no indication that the employer provided electrical services to these gas stations. Lastly, the CO observed that in rebuttal the employer introduced the need for fluency in Turkish as an additional requirement.

On August 5, 1996, the employer requested administrative review of Denial of Labor Certification (AF 100).

Discussion

The issues presented by this appeal are whether the employer provided lawful, job-related reasons for rejecting the U.S. applicants; whether the employer's requirements were unduly restrictive; and whether the employer documented that the position was full-time, permanent employment.

Generally, an employer must show that U.S. applicants are rejected solely for lawful, job-related reasons. §656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. §656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. §656.2(b).

The Board has held that an applicant is to be considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 90-INA-90 (Mar. 28, 1991); *Mancil-las International Ltd.*, 88-INA-321 (Feb. 7, 1990); *Microbilt Corp.*, 87-INA-635 (Jan. 12, 1988). An employer unlawfully rejects a U.S. worker if that worker satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *Sterik Co.*, 93-INA-252 (Apr. 19, 1994); *American Cafe,*

90-INA-26 (Jan. 24, 1991); *Cal-Tex Management Services*, 88-INA-492 (Sept. 19, 1990); *Richco Management*, 88-INA-509 (Nov. 21, 1989); *Dharma Friendship Foundation*, 88-INA-29 (Apr. 7, 1988).

In the Final Determination, the CO found that the employer unlawfully rejected Applicants Paul McCormick, Radcliff Davis, Leroy Gambrell, Frank Carrozza, Shelton Rainey, and David Godek. The CO initially noted that these applicants possessed the required two years of work experience as an electrician. For example, Applicant Godek possesses more than nine years of electrical experience, and Applicant Carrozza has more than thirteen years of electrical experience (AF 88). Despite their qualifications, the employer argued that both of these applicants were rejected because they failed to appear at a scheduled interview. However, written statements from these Applicants Godek and Carrozza and submitted to the state employment office indicate that they were only contacted by the employer after the scheduled interview date or a day in advance of the interview date. Mr. Godek stated that he did not receive the interview letter until two days after the scheduled interview (AF 64). Mr. Carrozza reported that he received the interview invitation on the afternoon before the scheduled interview date (AF 67). *See Riverside Convalescent Hospital*, 93-INA-255 (May 24, 1994) (labor certification properly denied where contact letter arrived too close to scheduled interview date); *Hervco Contractors*, 93-INA-261 (June 3, 1994) (certification properly denied where contact letter, dated June 9, scheduled the interview for June 12). Mr. Carrozza explained that he was unable to attend the interview because he was already scheduled to work the afternoon shift for his present employer. Moreover, it should be noted that the employer did not provide a phone number on the interview letter which would have enabled the applicants to contact the employer to reschedule the interview. In addition, there is no indication from the employer that it attempted to contact these six applicants by any other method except certified mail. *See Diana Mock*, 88-INA-255 (Apr. 9, 1990); *Jerry's Bagels*, 93-INA-461 (June 13, 1994) (reasonable efforts to contact qualified U.S. applicants may, in some circumstances, require more than a single type of contact). Based on the foregoing, we find that the employer effectively discouraged applicants from pursuing the position. Because the employer failed to comply with §656.21(b)(6) of the regulations, certification cannot be granted and further review of the record is unnecessary.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and,**(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.